No. 256

In the Supreme Court of the United States

OCTOBER TERM, 1941

DR. MAXIMILIAN GOLDSTEIN, DR. BENJAMIN SCHWARTZ, HERMAN RUBIN AND IRVING ELENTUCH, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the Circuit Court of Appeals (R. 5256–5270) is reported at 120 F. (2d) 485.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered June 18, 1941 (R. 5271). The petition for a writ of certiorari was filed on July 11, 1941. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925. See

also Rule XI of Rules of Practice and Procedure in Criminal Cases, promulgated by this Court May 7, 1934.

QUESTIONS PRESENTED

1. Whether the trial court in the preliminary hearing accorded the petitioners a fair opportunity to prove that a substantial portion of the Government's evidence was derived from illegal interception of telephone communications.

2. Whether the trial court applied the correct rule as to the burden of proof in holding that the Government's evidence was not derived from illegally intercepted telephone communications.

3. If the trial court did not apply the correct rule as to the burden of proof, whether the petitioners, not being parties to any of the intercepted telephone communications, may complain of the admission against them of evidence procured as a result of such interception.[1]

4. Whether the trial court's instructions deprived the petitioners of a fair trial by emphasizing the evidence of the prosecution or by intimating its views on factual issues submitted to the jury.

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[1] The petition states (Pet. 8), on the basis of evidence outside the record, that petitioners Goldstein and Rubin were parties to eight and fifteen intercepted telephone communications, respectively, but submits the case upon the assumption stated in question 3 above. See footnote on page 8 of the Petition, and Questions I and II at pages 13 and 14 of the Petition.

STATUTE INVOLVED

Section 605 of the Federal Communications Act of June 19, 1934, c. 652, 48 Stat. 1064, 1103 (47 U. S. C., sec. 605), provides, in part, as follows:

> No person receiving or assisting in receiving, or transmitting, or assisting in transmitting, any interstate or foreign communication by wire or radio shall divulge or publish the existence, contents, substance, purport, effect, or meaning thereof * * * and no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person * * * and no person having received such intercepted communication or having become acquainted with the contents, substance, purport, effect, or meaning of the same or any part thereof, knowing that such information was so obtained, shall divulge or publish the existence, contents, substance, purport, effect, or meaning of the same or any part thereof, or use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto * * *.

STATEMENT

In a thirty-count indictment returned March 22, 1940, in the United States District Court for the Southern District of New York, petitioners and six others were charged with using the United

States mails in the execution of a scheme to defraud (Sec. 215 of the Criminal Code, 18 U. S. C. § 338) and, in the thirtieth count, with conspiracy to commit the substantive offenses (Sec. 37 of the Criminal Code, 18 U. S. C. § 88) (R. 6–75). In essence, the scheme charged was the same as that which was before this Court in *Weiss* v. *United States*, 308 U. S. 321; that is, an elaborate plot, participated in by lawyers, doctors, "runners," and insurance policy holders, to defraud insurance companies by inducing them to pay false claims for simulated disabilities.[2] Defendant Joseph Garrow, charged as a member of the law firm which supervised the present conspiracy (R. 9–10), pleaded guilty prior to trial (R. 85).

[2] The Weiss conspiracy was directed by the law firm of J. J. and A. L. Weiss; the present case involves a competing ring under the direction of the law firm of Garrow and Garrow (R. 9, 623–624) which employed some of the same doctors and "runners." Thus, Drs. Goldstein and Messman, who were named as defendants in the *Weiss* case, are in the present case a defendant and co-conspirator, respectively (R. 6). It may be noted that on remand following the reversal of the convictions in the *Weiss* case the trial court, on motion of the defendants, conducted a preliminary inquiry into the sources of the Government's evidence in that case and concluded that the Government could avail itself of the testimony of Messman and others, despite the use of wire tapping. *United States* v. *Weiss*, 34 F. Supp. 99 (S. D. N. Y.). Thereupon all the defendants in the *Weiss* case, except petitioner Goldstein, pleaded guilty (Pet. 3). Much of the evidence in the preliminary hearing of the present case was incorporated by stipulation from this earlier hearing in the *Weiss* case (R. 114, 117 *et seq.*).

There was a severance as to two other defendants (R. 88). A fourth defendant pleaded guilty during the trial (R. 88). The remaining six defendants were convicted by the jury on various counts of the indictment, but only four have appealed (R. 91). Petitioners were sentenced as follows: Goldstein, fifteen months; Schwartz, one year and a day; Rubin, six months; and Elentuch, two months (R. 92). The convictions were affirmed by the Circuit Court of Appeals for the Second Circuit (R. 5271).

The sufficiency of the evidence introduced at the trial is not challenged, and the case turns largely upon the admissibility of the testimony of Messman and Garrow, who, it is alleged, were induced to confess and testify for the Government by being confronted with records of unlawful interceptions of their telephone messages. Petitioners also charge that the testimony of Messman and Garrow was strengthened and their recollection refreshed by the use of records of intercepted telephone communications to which the witnesses were parties (Pet. 4, 5–7). A preliminary hearing was held to investigate these charges and the evidence introduced at that hearing tended to establish the following facts:

In the early summer of 1936, two law firms were retained by a group of insurance companies to investigate disability frauds (R. 167, 187–188). One Harry Kipnis, who had been a

fraudulent claimant as well as a solicitor of fraudulent claims, first for the Weiss firm and later for the Garrow firm (R. 623–624, 638), made a confession to the insurance attorneys, implicating petitioner Goldstein, defendant Garrow, Dr. Messman, the Weisses, and others (R. 623–634). With the consent of Kipnis and another informer, Friedman, a concealed microphone was installed in each of their offices, by means of which conversations were overheard and recorded.[3] Telephone extension lines were also installed enabling employees of the insurance company to overhear telephone conversations between the informants and various members of the conspiracy (R. 186–187, 193–200, 234, 264–272, Gov. Exs. 8, 9, 10, 11, 17; Def. Exs. C to L, inclusive, in the preliminary hearing). However, the participation of the petitioners in the fraudulent scheme was known from Kipnis' statements prior to this arrangement, which was made solely to corroborate Kipnis' story (R. 218, 461, 466–467).

In November, 1936, the insurance companies turned over to the United States Attorney all the material they had gathered up to that point, including Kipnis' confession, a series of case histories which Kipnis had prepared covering fraud-

[3] No question is raised as to the admissibility of this type of evidence. See *Goldman* v. *United States*, 118 F. (2d) 310 (C. C. A. 2), certiorari denied June 2, 1941, Nos. 962, 963, 980, October Term, 1940.

ulent claims other than his own, daily reports by the informers covering their activities in the course of the investigation, the insurance company files in the suspect cases, and recordings and transcripts of the conversations overheard in the offices of Kipnis and Friedman[1] (R. 156–158, 621–685, 727–729). The United States Attorney assigned a post-office inspector to review this material (R. 152–153, 156–158). Early in December the inspector reported that the evidence then on hand warranted the indictment of 75 persons (R. 287), and recommended that prosecution should proceed "without any further investigation" (R. 158). The United States Attorney, however, determined to install taps on the telephone wires serving Messman's office, the Weiss and Garrow law offices, and J. J. Weiss' home, in order to obtain further corroboration (R. 258–259, 303–304, 311–312, 688). No investigation was made of leads or clues derived from these intercepted communications; the records and transcripts were merely filed away for future use in preparation for trial (R. 314, 338–339, 688–689, 809).

Upon his arrest on May 18, 1937, Messman was lodged in a cell with Nelson, a co-conspirator, who

[1] The report contained only one reference to a telephone conversation overheard in the informers' offices. This was a conversation relating to the *Weiss* case, not to the Garrow conspiracy, and its substance had previously been reported by Kipnis (R. 252–256, Def. Ex. H, Gov. Ex. 1).

told him that the Government "had all kinds of evidence against all of us," including wire taps (R. 428–431, 514–519). Later the same day Messman was questioned in the United States Attorney's office, where he was also told of the wire tapping (R. 519, 432–433, 519, 538). Messman offered to "break the entire racket wide open" if the United States Attorney would promise leniency (R. 434). He was told that the prosecutors "could make no promises," but that "we will do what we can to help you out"; on the following morning he made a full confession (R. 483–484, 521, 689–691). Thereafter he devoted a considerable amount of time to assisting in the preparation of the case and was placed on the Government pay roll at a salary varying from $65 to $100 a week, continuing down to the date of the preliminary hearing (R. 231, 485, 509–510).

Messman testified that the references to wire tapping in his conversations with Nelson and the Assistant United States Attorneys had nothing to do with his determination to confess (R. 520, 540, 542, 552); that he had realized the inevitability of detection as far back as September 1936 (R. 519–520) when information as to Kipnis' activities as an informer came to Weiss' attention (R. 896–898); that he had thought of confessing two weeks prior to the arrest (R. 519); that he had seen Kipnis at police headquarters at the time of his arrest and connected his presence with the incidents of Sep-

tember 1936 (R. 549); that he had actually made up his mind to confess when he entered the room to be interviewed by the Assistant United States Attorneys (R. 545, 552), but that he had delayed in order to "size up" his interviewers and to try to better his position (R. 540, 545, 550).

Four months after Messman's confession, when the Government was preparing to try the *Weiss* case, a number of the records of intercepted telephone conversations were, for the first time, played to Messman and he identified them and initialed corrected transcripts (R. 351–352, 356–357, 485–486, 523). But Messman testified that he recalled the substance of these conversations independently and that the records, transcripts, and references thereto in the Government trial brief, which he reviewed prior to the Weiss trial, merely refreshed his recollection of such matters as dates and exact wording (R. 494, 513, 524–535). Messman was instructed not to use the wire taps in any manner in preparing to testify in the present case, and they were not used (R. 366, 368, 472–473).

Elias Garrow, brother and law partner of defendant Joseph Garrow, was among those arrested on May 18, 1937 (R. 403). When interviewed by the Assistant United States Attorneys he claimed his privilege against self-incrimination, and they did not mention wire tapping (R. 341, 403, Def. Ex. CC in the preliminary hearing). He had no further talks with representatives of the United States

Attorney until after he pleaded guilty to one of the insurance fraud indictments on April 20, 1939 (R. 403). He testified at the preliminary hearing that he knew from newspapers and conversations with J. J. Weiss that the Government had tapped the wires of the conspirators, including his own, but he believed that none of his conversations which the Government might have overheard were incriminating (R. 415–417), and they had nothing to do with his decision to plead guilty (R. 408, 412–413, 418).

ARGUMENT

I

Petitioners complain that the preliminary hearing was unfair because the trial judge improperly limited cross-examination and refused to permit them to inspect certain documents embodying parts of the Government's evidence (Pet. 9–10, 27–28).

A. The so-called cross-examination occurred during defense counsel's questioning of the post-office inspector and the insurance company attorney, who were called *by the defense* (R. 126, 153, 175, 180). If the fact that these witnesses were associated with the prosecution justified some relaxation of the rules governing direct examination, it was nevertheless within the discretion of the court to exert a restraining influence upon the tendency of defense counsel to lead the witnesses and to attempt to discredit answers previously

given. Defense counsel recognized this by acquiescing in each instance to the ruling of the court, in three of the four cases expressly withdrawing the objectionable questions.

B. It was entirely proper for the trial court to refuse defense counsel access to the whole of such documents as the post office inspector's report, which summarized all the evidence submitted to the United States Attorney by the insurance companies (R. 153–154, 156–158, 292–293); the transcript of Messman's interview of May 18, 1937, and his confession of May 19, 1937 (R. 316–317, 323, 327); the transcript of the Garrow interview of May 18, 1937 (R. 339–340); and the original trial brief covering Messman's testimony in the Weiss trial (R. 369–370). In each case, as petitioners concede (Pet. 9), the trial court, after examining the document, made available such portions as expressly related to wire tapping. Clearly, anything more would have compelled the Government to disclose the bulk of its evidence prior to trial. Cf. *Nardone* v. *United States*, 308 U. S. 338, 342.

It may, of course, be inconvenient to the defense that it must, in the first instance, accept the trial court's judgment as to what portions of a relevant document may be examined.[3] But that in-

[3] Cf. *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, 233–234, where this Court said that it was within the sound discretion of the trial court whether grand jury minutes used to refresh witnesses' recollection should be shown to defense counsel.

convenience is inevitable under the rules laid down in the *Nardone* case for the conduct of such preliminary hearings; and the hardship in this case was certainly mitigated, if not eliminated, by the trial court's ruling that additional objections at the trial on account of illegal wire tapping would not be foreclosed by the preliminary hearing (R. 478, 615). Under this ruling defense counsel had the opportunity to judge for themselves as the testimony unfolded during the trial whether to pursue further the inquiry begun in the preliminary hearing. From their failure to do so it may reasonably be inferred that the evidence revealed at the trial lent no additional support to the charge that the Government's case rested on wire tapping.

II

A decision of the question whether petitioners have standing to complain of the interceptions is not essential to the affirmance of their convictions. The Circuit Court of Appeals reached that question only because it concluded—erroneously, we believe—that the district court had imposed the burden of proof in the preliminary hearing upon the defendants rather than upon the Government. 120 F. (2d) at 488. We believe that the trial court applied the correct rule as to burden of proof and that its rulings (R. 613–614, 962, 2110, 5081–5082) permitting Messman and Garrow to testify constitute a finding that the Government had

proved that considerations other than wire tapping brought about the determination of these defendants to confess and testify.

The Circuit Court of Appeals overlooked the fact that the Government expressly conceded at the preliminary hearing that the defense had carried its burden of establishing a *prima facie* case under the *Nardone* decision, and that the burden had passed to the Government (R. 819–820, 821–822). In the face of this concession, there is no basis whatever for the conclusion that the trial court nevertheless imposed the burden upon the defendants or was under any misapprehension as to the applicable rule. Moreover, petitioners at no time took issue with the trial court or Government counsel on the burden of proof (cf. R. 324–326, 348), so that the Circuit Court of Appeals had to go outside the assignments of error, briefs, and arguments below to consider that question.

If, as we believe clear, the trial court applied the proper rule as to burden of proof and, with fair basis in the evidence, found that the Government had established that its proof had an origin independent of wire tapping,[9] the further question whether petitioners have standing to

[9] See summary of the evidence in the Statement, *supra*, pp. 5–10. The Circuit Court of Appeals conceded that this evidence would have been sufficient to sustain an express finding that the "'taps' contributed nothing" to the breakdown of Messman. 120 F. (2d) at 488.

complain of any wire tapping which did take place is not presented. But even if that question be considered, the Circuit Court of Appeals was clearly correct in ruling that persons who are not parties to intercepted telephone communications have no standing to complain of the introduction of testimony procured as a result of such interceptions. We can here add little to the careful analysis in the opinion below showing, by analogy to decisions under the Fourth Amendment,[7] that the right of privacy conferred by Section 605 of the Federal Communications Act may be invoked only by the "sender" of the communication. 120 F. (2d) at 489–490.

Petitioners argue that the analogy is imperfect because Section 605 expressly forbids "use" as well as acquisition of certain evidence, whereas it is only by "judicial decisions" that the Fourth Amendment forbids use of evidence acquired by unlawful search or seizure (Pet. 22–23). See,

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[7] Under the search and seizure clause, only the owner or lawful tenant of the premises searched may question the legality of the search. *Lewis* v. *United States*, 92 F. (2d) 952 (C. C. A. 10); *United States* v. *Muscarelle*, 63 F. (2d) 806 (C. C. A. 2), certiorari denied, 290 U. S. 642; *Whitcombe* v. *United States*, 90 F. (2d) 290 (C. C. A. 3), certiorari denied, 302 U. S. 759; *Belcher* v. *United States*, 90 F. (2d) 573 (C. C. A. 8); *Shore* v. *United States*, 49 F. (2d) 519 (App. D. C.), certiorari denied, 283 U. S. 865; *Ingram* v. *United States*, 113 F. (2d) 966 (C. C. A. 9); *Creech* v. *United States*, 97 F. (2d) 390 (C. C. A. 5). Cf. *Agnello* v. *United States*, 269 U. S. 20, 35; *Hale* v. *Henkel*, 201 U. S. 43, 69, 70.

e. g., *Silverthorne Lumber Co. v. United States*, 251 U. S. 385, 392. Such a distinction is wholly without substance. The Fourth Amendment, as judicially construed, forbids "use" of illegally acquired evidence; yet the federal courts have uniformly declined to hear objections to such "use" when asserted by persons who were not owners or tenants of the premises illegally searched. There is no reason why a comparable statutory inhibition should require or be given more drastic sanction.

Petitioners also cite (Pet. 20–21) the *Weiss* case as supporting the proposition that any defendant may raise the question, even though his wires have not been tapped, because in that case Goldstein's conviction was reversed, although none of his calls were intercepted.[8] The opinion is silent on the reasons for reversal as to Goldstein, but in that case the actual intercepted messages were introduced and three of the four petitioners were, as parties to the messages, affirmatively entitled to their exclusion from evidence. Where the intercepted messages themselves are offered, a judge may, perhaps, intervene upon his own motion to prevent the overt perpetration in court of the offense of divulging an intercepted communication, especially where some of the parties before him have a personal interest in the exclusion of the

[8] Brief of United States, No. 42, October Term, 1939, pp. 9, 40–41.

messages. Cf. Mr. Justice Brandeis' dissenting opinion in *Olmstead* v. *United States*, 277 U. S. 438 at 480 and 485. It is quite another matter to accord an accused, whose rights have not been invaded, the power to inaugurate elaborate collateral inquiries into possible violations of the statutory immunities of other persons. In any event, in view of the absence of discussion of the point in the *Weiss* opinion, the decision in that case as to Goldstein plainly cannot be regarded as sustaining the novel and far-reaching doctrine urged by petitioners here.[9]

Finally, petitioners argue that the holding of the court below leaves open the possibility of introducing at the trial of A and B intercepted messages of A against B and intercepted messages of B against A (Pet. 24). This argument assumes without warrant that enforcement agencies will continue to intercept and divulge telephone communications in violation of Section 605 as construed by this Court in the first *Nardone* case, 302 U. S. 379, and in *Weiss* v. *United States*, 308 U. S. 321.

III

Petitioners complain that the trial court's charge to the jury prejudiced their rights by

[9] The opinion below suggests as an alternative ground for affirmance that section 605 "prohibits only the divulging of the message, not its use after it has been divulged." 120 F. (2d) at 490. We agree with petitioners (Pet. 25–26), however, that it is difficult to reconcile this view with the express terms of the statute prohibiting the "use" of such information.

emphasizing the prosecution's evidence and by intimating through a series of rhetorical questions its own views on issues which were to be decided by the jury (Pet. 11–13, 28–29).

We submit that the charge when read in its entirety is eminently fair. It is well settled that a trial court need not recapitulate all the items of evidence (*Allis* v. *United States*, 155 U. S. 117, 124), and that a federal judge may comment on the evidence so long as the factual issues in the case are fairly submitted to the jury for its determination. See *Quercia* v. *United States*, 289 U. S. 466, 469; *United States* v. *Murdock*, 290 U. S. 389, 394. This was certainly done in the present case, and the judge emphasized that it was the duty of the jury to disregard any opinions which he might inadvertently express (R. 5124, 5130–5135, 5137, 5145–5146, 5155, 5156). The "rhetorical questions" referred to merely presented appropriate issues for the jury's consideration. If the questions seemed to permit of but one answer, it was only because the evidence of guilt was overwhelming. Moreover, only a single specific complaint of undue stressing of the prosecution's testimony was made when the trial court invited exceptions to the charge, and, when the judge explained the remarks objected to, counsel, apparently satisfied, dropped the matter (R. 5161–5162, cf. 5167–5168). The criticism now directed at the trial court's instructions must be weighed in the light of the complaisance of defense counsel at the time the instruc-

tions were given. Cf. *Ellis* v. *United States*, *supra*, at 122; *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, 238–239.

CONCLUSION

The scope of the prohibition against wire tapping has been fully defined in this Court's decisions in the *Nardone* and *Weiss* cases, so that the problem presented in the instant case is not likely to arise again. The petitioners' guilt under the evidence is not disputed. The issue whether that evidence was unlawfully procured was investigated in a fairly conducted preliminary hearing and decided against petitioners. There is, therefore, no occasion for further review of the case by this Court. The petition for a writ of certiorari should be denied.

Respectfully submitted.

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